Amer Singh @ Mohinder Singh v Kelana Resorts Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO: S1(S5)-22-340 OF 1992
ABDUL MALIK ISHAK J
10 MAY 2007

Companies and Corporations — Resolution — Resolution passed by board of company — Whether resolution gives rise to inference that there was a debt owing — s 17 Evidence Act 1950 — Internal document — Whether can amount to admission of a debt

Contract — Assignment — Assignment of debts — Whether a debtor can assign a debt — s 4(3) Civil Law Act 1956 — Whether defendant obliged to pay — Whether plaintiff's conduct discharged defendant from debt

Contract — Consideration — Legal liability to pay(Promise of payment) — Intention to create legal relations — Defendant not in existence at time of consideration — Whether debt legally enforceable — Whether consideration existed

Evidence — Admissions — Of debt — Unilateral declaration of intent — Whether resolutions can be led in evidence to prove admissions — Whether can be regarded as a contract — s 17 & s 92 Evidence Act 1950

Swima Berhad ('Swima') was incorporated by Mohd Yussof Zainal and his wife, Ursula on 9 March 1982. Mohd Yussof Zainal held 50% of his shares on trust for the plaintiff who was then deputy general manager of PKNS during that period until his retirement in March 1983. In 1982, Swima was granted a 20 year lease to a piece of land held under Lot 1122 Kelana Jaya ('the PKNS land') by Perbadanan Kemajuan Negeri Selangor ('PKNS'). From 1982 onwards up to 1985, Dato Malik Salleh (DW2) and Kelana Realty Sdn Bhd took up shares in Swima. Gill (Paramjit Singh Gill, DW1) and Mohd Noor were the shareholders of Kelana Realty Sdn Bhd. Between 1984 to 1986, the plaintiff and Mohd Yussof Zainal were managing Swima which had its office at the shop house in Kelana Jaya registered in the name of Mohd Yussof Zainal. Again, 50% of this shop house was held by Mohd Yussof Zainal on trust for the plaintiff. Swima took a loan in early 1986 from Public Finance Berhad ('Public Finance'). As security for the loan, the plaintiff charged a property which was held in the name of Dato' Francis McWilliams ('the McWilliams property') but over which property, according to the plaintiff, the plaintiff held a Power of Attorney. Everything did not turn out well. By the end of 1986, Swima was being sued by its contractors. Swima defaulted on the loan and Public Finance instituted foreclosure proceedings against the McWilliams property and also sued the guarantors to the loan, who were the plaintiffs, Gill, Dato Malik Salleh, Mohd Yussof Zainal and John

Eu. In March 1990, Gill (DW1) and the plaintiff sold a factory belonging to a company controlled by them and John Eu equally, namely, Pemba Sdn Bhd and they then applied the proceeds of sale totaling 1.018m on behalf of Swima, to settle the Public Finance loan, afterwhich the bankruptcy petitions were withdrawn against the guarantors. This amount was treated as having been paid equally by the plaintiff, Gill (DW1) and Mohd Yussof Zainal. Since Gill (DW1) had bought all of Mohd Yussof Zainal's interest in Swima, the amount of RM339,333 standing to his credit was transferred to Gill (DW1). In a restructuring exercise, the defendant was incorporated on 3 August 1990 and took up the assignment of the PKNS land from Swima in return for an allotment of the defendant's shares. On 29 August 1990 at 4.30 pm, at first directors' meeting of the defendant, it was stated, inter alia, in the minutes that the sum was the sum of RM339,333 paid to the Public Finance was deemed to have been paid on behalf of the company by the plaintiff in which will be a debt due to the person by the Company together with interest thereon at 10% per annum and also the sum of RM10,000 incurred by the plaintiff towards clearing of the pond and bushes and other incidentals was approved. The plaintiff claimed that the defendant owed him a sum of RM349,333 with interest at the rate of 10% per annum from the date of the acknowledgement of the said debt as contained in the minutes of the first board of directors' meeting dated 29 August 1990 and confirmed in the minutes of the second board of directors' meeting dated 15 March 1991. According to the plaintiff, despite several requests for repayments of the debt, the defendant failed, refused and/or neglected to repay the same. The defendant denied owing the plaintiff any money.

Held, dismissing the plaintiff's claim with costs:

(1) There is a material difference between an assertion that a document is evidence of a debt and an assertion that a document is an admission of a debt. What then is an admission? It is defined in s 17 of the Evidence Act 1950 as 'a statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact….' So it can be said that an admission merely suggests or infers a fact. From a reading of s 17 of the Evidence Act 1950, nothing more can be read into the admission other than what can be inferred from the contents thereof. Even if a fact can be inferred from the admission, the admission was not conclusive proof of the fact (see para 16).

(2) It was part and parcel of my judgment that the first resolution does not show that the defendant regarded itself as being obligated to pay the debt to the plaintiff. The first resolution, with respect, points to the contrary. The words employed in the first resolution clearly indicated that, if at all, the defendant only intended to bind itself to make payment of the alleged sums to Swima and not to the plaintiff (see para 20).

(3) It must be borne in mind that the first resolution was not a contract. It was an admission and was pleaded and at all times treated as such by the plaintiff. This admission must be viewed separately from the contract under which the debt was incurred. Thus, in my view, to treat the first resolution as a contract for a debt and an admission of a debt interchangeably was wrong. In the present case, the contract for which the debt was incurred does not exist, let

alone one which had been reduced into writing and sections 91 and 92 of the Evidence Act 1950 do not apply (see para 33).

(4) Even if the defendant agreed to pay the plaintiff in consideration of Swima assigning the PKNS land to the defendant, the plaintiff remained a stranger to this obligation. The plaintiff was not privy to it. The plaintiff was merely a person who stood to benefit from the contract. The obligation to pay the plaintiff was owed by Swima (see para 48).

(5) The plaintiff did not provide any lawful consideration to the defendant for assuming the debt from Swima. The only consideration in evidence provided by the plaintiff was that Pemba Sdn Bhd which the plaintiff confused with himself personally had made payments towards the discharge of the McWilliams property that was charged for the benefit of Swima to Public Finance and towards clearing the pond, bushes and the like. But this was not consideration to the defendant which was not even in existence at that time (see para 62).

[Bahasa Malaysia summary

Swima Berhad ('Swima') telah ditubuhkan oleh Mohd Yussof Zainal dan isterinya, Ursula pada 9 Mac 1982. Mohd Yussof Zainal memegang 50% daripada saham-sahamnya atas amanah untuk plaintif yang pada masa itu adalah Penolong Pengarah Besar PKNS sehinggalah tempoh persaraannya pada Mac 1983. Dalam tahun 1982, Swima telah diberikan 20 tahun pajakan ke atas sebidang tanah yang dikenali sebagai Lot 1122 Kelana Jaya ('tanah PKNS') oleh Perbadanan Kemajuan Negeri Selangor ('PKNS'). Dari tahun 1982 sehingga 1985, Dato Malik Salleh (DW2) dan Kelana Realty Sdn Bhd telah membeli saham-saham Swima. Gill (Paramjit Singh Gill, DW1) dan Mohd Noor adalah pemegang-pemegang saham Kelana Realty Sdn Bhd. Antara tahun 1984 sehingga 1986, plaintif dan Mohd Yussof Zainal telah menguruskan Swima yang mempunyai pejabat di rumah kedai di Kelana Jaya yang didaftarkan atas nama Mohd Yussof Zainal. Lagi sekali, 50% daripada rumah kedai ini dipegang oleh Mohd Yussof atas amanah untuk plaintif. Pada awal tahun 1986, Swima telah memohon pinjaman daripada Public Finance Berhad ('Public Finance'). Sebagai jaminan kepada pinjaman tersebut, plaintif telah mencagarkan harta yang dipegang di bawah nama Dato' Francis McWilliams ('Harta McWilliams') tetapi ke atas harta ini, menurut plaintif, plaintif mempunyai surat kuasa wakil. Segala-galanya tidak berjalan seperti yang dirancang. Sehingga akhir tahun 1986, Swima telah disaman oleh kontraktor-kontraktor. Swima gagal membayar pinjaman dan Public Finance telah memulakan prosiding sekat tebus terhadap harta McWilliams dan menyaman penjamin-penjamin untuk pinjaman tersebut, yang mana plaintif-plaintif adalah Gill, Dato Malik Salleh, Mohd Yussof Zainal dan John Eu. Pada bulan Mac 1990, Gill (DW1) dan plaintif telah menjual kilang yang dimiliki oleh syarikat yang dikawal sama banyak oleh mereka dan John Eu, yang dikenali, Pemba Sdn Bhd dan mereka memohon hasil jualan berjumlah RM1.108j bagi pihak Swima untuk menyelesaikan pinjaman dengan Public Finance, yang selepasnya petisyen kebankrapan telah ditarik terhadap penjamin-penjamin. Jumlah ini telah diibaratkan sebagai telah dibayar sama banyak oleh plaintif, Gill (DW1) dan Mohd Yussof Zainal. Memandangkan Gill (DW1) telah membeli

kesemua kepentingan Mohd Yussof Zainal dalam Swima, jumlah RM339,333-00 yang dikreditkan ke atasnya, telah dipindahkan kepada Gill (DW1).

Dalam proses penstrukturan semula, defendan telah ditubuhkan pada 3 Ogos 1990 dan mengambil penyerahanhak tanah PKNS daripada Swima sebagai balasan untuk pemberian saham-saham defendan. Pada 29 Ogos 1990 pada jam 4.30 petang, semasa mesyuarat lembaga yang pertama dengan defendan, ia telah menyatakan, antara lain, dalam minit-minit bahawa jumlah RM339,333-00 yang dibayar kepada Public Finance dianggap telah dibayar bagi pihak syarikat oleh plaintif yang mana akan menjadi hutang yang tertunggak kepada orang tersebut oleh syarikat bersama dengan faedah seterusnya sebanyak 10% setahun dan juga RM10,000-00 yang telah digunakan oleh plaintif dalam usaha untuk membersihkan kolam dan semak samun dan lain-lainnya yang telah pun diluluskan.

Plaintif mendakwa defendan telah terhutang kepadanya sebanyak RM349,333-00 beserta faedah pada kadar 10% setahun dari tarikh hutang tersebut diakui sebagaimana terkandung dalam minit-minit mesyuarat ahli lembaga pengarah bertarikh 29 Ogos 1990 dan mengesahkan dalam minit mesyuarat ahli lembaga pengarah kali kedua pada 15 Mac 1991. Menurut plaintif, walaupun beberapa permintaan untuk membayar balik hutang tersebut, defendan telah gagal, enggan dan/atau cuai untuk membayarnya. Defendan menafikan ada terhutang wang kepada plaintif.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Terdapat perbezaan material antara kenyataan dokumen berkenaan keterangan hutang dan kenyataan dokumen berkenaan pengakuan hutang. Apakah yang dimaksudkan dengan pengakuan? Ia telah didefinasikan dalam S 17 Akta Keterangan 1950 sebagai 'kenyataan, secara lisan atau melalui dokumen yang membawa kepada kesimpulan berkenaan fakta yang dipertikaikan dan fakta relevan….' Jadi ia boleh dikatakan bahawa pengakuan hanyalah membawa atau menyimpulkan fakta. Daripada pembacaan s 17 Akta Keterangan, tiada apa-apa yang boleh diertikan sebagai pengakuan selain daripada kesimpulan dari isi kandunganya sendiri. Walaupun jika faktanya boleh disimpulkan daripada pengakuan, pengakuan itu tidak kukuh bagi membuktikan fakta (lihat perenggan 16).

(2) Ia adalah sebahagian daripada penghakiman saya bahawa resolusi pertama tidak menunjukkan bahawa defendan dikatakan sebagai bertanggungjawab membayar hutangnya kepada plaintif. Resolusi pertama, dengan hormatnya, menjurus kepada arah yang berlainan. Perkataan yang digunakan dalam resolusi pertama jelasnya menunjukkan bahawa, jika tidak semua, defendan hanya meniatkan untuk mengikat dirinya bagi membuat bayaran untuk jumlah yang didakwa kepada Swima dan bukannya kepada plaintif (lihat perenggan 20).

(3) Seharusnya, resolusi pertama bukannya kontrak. Ia adalah pengakuan dan telah dikemukakan dan pada setiap masa diumpamakan sebegitu oleh plaintif. Pengakuan ini hendaklah dilihat secara berasingan daripada kontrak dimana hutang telah dibuat. Oleh itu, pada hemat saya untuk menganggap resolusi pertama sebagai kontrak untuk hutang dan pengakuan untuk hutang yang

boleh ditukarganti adalah salah. Dalam kes ini, kontrak untuk hutang tidak wujud, lebih-lebih lagi ia telah dibuat secara bertulis dan s 91 dan 92 Akta Keterangan adalah tidak terpakai (lihat perenggan 33).

(4) Jika defendan bersetuju membayar kepada plaintif sebagai balasan Swima meletakhak tanah PKNS kepada defendan, plaintif masih lagi orang luar terhadap kewajipan ini. Plaintif bukan privi kepadanya. Plaintif hanyalah orang yang mendapat manfaat daripada kontrak. Kewajipan untuk membayar plaintif ditanggung oleh Swima (lihat perenggan 48).

(5) Plaintif tidak menyediakan balasan yang sah disisi perundangan kepada defendan kerana mendapatkan hutang daripada Swima. Balasan hanyalah untuk keterangan yang disediakan oleh plaintif bahawa Pemba Sdn Bhd yang mana plaintif telah mengelirukan dirinya telah membuat bayaran untuk mendapatkan kembali harta McWilliams yang telah dicagarkan untuk kepentingan Swima kepada Public Finance dan untuk membersihkan kolam, semak samun dan lain-lain. Tetapi ini bukanlah balasan kepada defendan yang mana pada masa itu tidak wujud (lihat perenggan 62).]

Notes

For the case on resolution passed by board of company, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 643.

For cases on assignment of debts, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2176–2180.

For cases on whether consideration exists under contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2702–2703.

For the case on admission of debt, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 117.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd [1995] 3 AMR 3050 (refd)

Bamford v Bamford [1969] 1 ALL ER 969 (refd)

Credit Corp [1991] 1 MLJ 409 (refd)

Foss v Harbottle (1842) 2 Hare 461 (refd)

Gabriel Peter & Partners v Wee Chong Jin [1998] 1 SLR 374 (refd)

John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (refd)

Letang v Cooper [1965] 1 QB 222 (refd)

Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)

Lim Kim Swee v Tan Meng Sang [1960] MLJ 262 (refd)

Macaura v Northern Assurance Co Ltd [1915] AC 619 (refd)

M.A. Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183 (refd)

Nasri v Mesah [1971] 1 MLJ 32 (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

NRMA v Parker [1986] 11 ACLR 1 (refd)

Perwira Habib Bank Malaysia Berhad v Haji Abdullah bin Haji Sulaiman & Anor (1985) 2 CLJ 489 (refd)

Read v Brown (1888) 22 QBD 128 (refd)

Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301 (refd)

Scott v Scott [1943] 1 ALL ER 582 (refd)

Sio Koon Lin v SB Mehra [1981] 1 MLJ 275 (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd [1997] 1 AMR 1 (refd)
Taib bin Awang v Mohamed bin Abdullah [1983] 2 MLJ 413 (refd)

Legislation referred to
Civil Law Act 1956 s 4(3)
Evidence Act 1950 ss 17, 31, 114(g)
Contracts Act 1950 s 2

Cantius Leo Cameons (C. Leo Cameons) for the plaintiff.
Jasvinjit Singh (A.J. Ariffin, Yeo & Harpal) for the defendant.

Abdul Malik Ishak J:

[1] In narrating the facts, I must start by mentioning a company known as Swima Berhad ('Swima'). It was incorporated by Mohd Yussof Zainal and his wife, Ursula on 9 March 1982. Swima features prominently in this case. In early 1982, Swima was granted a 20 year lease to a piece of land held under Lot 1122 Kelana Jaya ('the PKNS land') by Perbadanan Kemajuan Negeri Selangor ('PKNS'). Swima intended to build a members club on the PKNS land. Mohd Yussof Zainal held 50% of his shares on trust for the plaintiff. The plaintiff was the deputy general manager of PKNS during the period until his retirement in March 1983.

[2] From 1982 onwards up to 1985, Dato Malik Salleh (who gave evidence as DW 2) and Kelana Realty Sdn Bhd took up shares in Swima. Gill (Paramjit Singh Gill, who gave evidence as DW1) and Mohd Noor were the shareholders of Kelana Realty Sdn Bhd. Gill (DW1) was a practising lawyer with an office at Campbell Complex, Kuala Lumpur. Between 1984 to 1986, the plaintiff and Mohd Yussof Zainal were managing Swima which had its office at the shop house in Kelana Jaya registered in the name of Mohd Yussof Zainal. Again, 50% of this shop house was held by Mohd Yussof Zainal on trust for the plaintiff.

[3] Swima was growing and to meet its development expenditure, Swima took a loan in early 1986 from Public Finance Berhad ('Public Finance'). As security for the loan, the plaintiff charged a property which was held in the name of Dato' Francis McWilliams ('the McWilliams property') but over which property, according to the plaintiff, the plaintiff held a Power of Attorney. According to the defendant and it is the defendant's evidence that the plaintiff was the beneficial owner of the McWilliams property. Everything did not turn out well. By the end of 1986, Swima was being sued by its contractors. Swima also owed its project consultants, consulting engineers and quantity surveyors fees amounting to not less than RM2.5m. Swima defaulted on the loan and Public Finance instituted foreclosure proceedings against the McWilliams property and also sued the guarantors to the loan. Public Finance obtained judgment and thereafter filed bankruptcy proceedings against the guarantors. Interestingly, these guarantors were the directors of Swima and they included the plaintiff, Gill, Dato Malik Salleh, Mohd Yussof Zainal and John Eu.

[4] Sometime in March 1990, Gill (DW1) and the plaintiff sold a factory belonging to a company controlled by them and John Eu equally, namely, Pemba Sdn Bhd and they then applied the proceeds of sale to settle the Public Finance loan. Having settled the loan, the bankruptcy petitions were withdrawn against the guarantors. In total, the sum of RM1,018m was paid to Public Finance from the sale proceeds of Pemba Sdn Bhd on behalf of Swima. This amount was treated as having been paid equally by the plaintiff, Gill (DW1) and Mohd Yussof Zainal. Since Gill (DW1) had bought all of Mohd Yussof Zainal's interest in Swima, the amount of RM339,333.00 standing to his credit was transferred to Gill (DW1).

[5] It was during this period that a restructuring exercise was undertaken. Under this restructuring, Swima would assign the PKNS land to a newly incorporated company in return for an allotment of shares in the new company. In this way, the creditors of Swima would be satisfied upon receipt by Swima from the profits of the new company. This would allow the PKNS land to be developed without disturbance by the creditors of Swima.

[6] On 3 August 1990, the defendant was incorporated and it took up the assignment of the PKNS land from Swima. On 29 August 1990 at 4.30 p.m., a first directors' meeting of the defendant was held and it was resolved as follows (see encl 35):

> Paragraph 1.11
>
> That the Company do take by way of an assignment from SWIMA BHD all their rights interest and title in all that piece of land held under Lot 1122, Kawasan SS7, Kelana Jaya in area of 576,751 square feet more or less as set out in the letter from Perbadanan Kemajuan Negeri Selangor (hereinafter referred to as PKNS) dated 17th August 1990 a copy of which letter is annexed to the minutes hereto be approved and the consideration for the said assignment be as follows:
>
> (a) The allotment to SWIMA BHD 432,551 shares of $1/- each fully paid up representing the amount paid by SWIMA BHD towards the costs of the said land to PKNS and credited as paid by PKNS.
>
> (b) That the Company do acknowledge and accept the payment of the sum of $923,000/- and $90,000/- paid to Public Finance Bhd to discharge all that piece of land held under EMR 2597 Lot No 503, Mukim of Ulu Kelang registered in the name of Datuk Francis McWilliam, which was charged by way of Third Party Charge to secure moneys lent to SWIMA BHD for operating costs in connection with the development of the land by SWIMA BHD. That the whole of the said sum of $1,018,000/- be deemed to have been paid on behalf of the company by the following persons in the proportions set out against their names which will be a debt due to the persons named below by the Company together with interest thereon at 10% per annum.
>
> (i) Mr Paramjit Singh Gill @ Parathpal Singh Gill $678,667/-
>
> (ii) Mr Amer Singh Bhatt $339,333/-
>
> (iii) Total $1,018,000/-
>
> The company do hereby approve the expenditure incurred by and on behalf of the company towards clearing of the pond and bushes and other incidentals:
>
> (a) Mr P.S. Gill $10,000/-

(b) Mr A.S. Bhatt $10,000/-

(c) Total $20,000/-

which sums will be a debt due by the Company to the persons named above and will be repaid together with interest at 10% per annum.

Again, on 29 August 1990 at 5.00 p.m, an extraordinary general meeting of the defendant was held and at this meeting the directors' were authorised and empowered to:

(a) Allot to Swima Berhad 432,551 ordinary shares of $1/- each fully paid up in the Company at par in consideration of Swima Berhad transferring the sum of $432,551/- standing to their credit with Perbadanan Kemajuan Negeri Selangor on account of consideration for all that piece of land held under Lot No. 1122 Kawasan SS7, Kelana Jaya in area of 576,751 square feet which said land Swima Berhad has agreed to assign and transfer to the company.

(b) That the Company do acknowledge that the sum of $1,018,000/- was monies used by Swima Berhad towards operating costs in the development of the said land which were monies borrowed from Public Finance Berhad against the security of a third party charge over land held under EMR 2597 for Lot No. 503, Mukim of Ulu Kelang and the Company acknowledges that the said sum of $1,018,000/- was repaid on behalf of the company by:

Mr Paramjit Singh Gill as to $ 678,667.00

Mr Amer Singh Bhatt as to $ 339,333.00

$ 1,018,000.00

and shall be a debt due by the company together with interest at 10% per annum.

It must be borne in mind that the minutes of the first directors' meeting was later read and confirmed at the second directors' meeting that was held on 15 February 1991 at 4.30 p.m. (see encl 35 at p 19).

THE PLAINTIFF'S CLAIM

[7] Concisely put, the plaintiff's claim as averred in the statement of claim in encl 42 is that the defendant owes him a sum of RM349,333.00 at 10% interest per annum from the date of the acknowledgement of the said debt as contained in the minutes of the first board of directors' meeting dated 29 August 1990 and confirmed in the minutes of the second board of directors' meeting dated 15 March 1991. According to the plaintiff, despite several requests for repayments of the debt, the defendant failed, refused and/or neglected to repay the same. It was averred that on 27 March 1992, the plaintiff sent a letter of demand to the defendant seeking payment of the debt within seven days but to date the defendant failed to do so. Wherefore the plaintiff claims repayment of the sum of RM349,333.00 at 10% interest from 29 August 1990 till full payment, costs and such other order as ordered by the court.

[8] In truth, the plaintiff's claim for the sum of RM349,333.00 is made up of two parts. The division of the sum claimed into two parts can be seen in para 3 of the statement of claim where the plaintiff claims:

(a) a sum of RM339,333.00 and interest thereon at the rate of 10% per annum from 29 March 1990 (it should be 29 August 1990) until full settlement thereof; and

(b) a further sum of RM10,000.00 being expenses incurred by the defendant towards clearing (membersihkan) the ponds, bushes and the like.

The necessity for taking these claims separately is because there is no pleading as to the entitlement to interest of 10% or any other rate on the latter sum of RM10,000.00 as prayed for.

[9] The statement of claim goes on to plead an alleged admission of the debt contained in the first directors' meeting and confirmed in the second directors' meeting. But there is no mention of the EGM minutes in the statement of claim or in the submissions and that being the case, I will leave the matter as it stands. The plaintiff then pleads that repeated demands were made of the defendant for payment of the said sum of RM349,333.00 but the defendant had failed, refused or neglected to pay the said sum to the plaintiff. However, it must be emphasised that no particulars of these demands were ever pleaded nor given in evidence. It must be put on record that there is a letter dated 27 May 1992 requesting payment of the loan sum of RM 349,333.00 which letter the defendant admits receiving.

THE DEFENDANT'S DEFENCE

[10] Briefly put, the defence may be stated in this way:

(a) that the sum of RM339,333.00 was paid by the plaintiff to Public Finance to partially redeem a loan owed by Swima which loan was secured by a charge on a land which was beneficially owned by the plaintiff;

(b) that the sum of RM10,000.00 was money alleged to have been spent by the plaintiff on behalf of Swima and this meant that the defendant is under no obligation to repay the debt;

(c) as far as the minutes of the first directors' meeting and the minutes of the second directors' meeting are concerned, it is the defendant's defence that they were private, confidential and internal documents and that they do not contain an admission of liability and the plaintiff as a director cannot rely on the same;

(d) the first and the second directors' meetings were conditional upon two very important matters, namely:

(i) the defendant was to obtain a profit from the proceeds of the development of the PKNS land which was applied for by the defendant; and

(ii) the plaintiff will not interfere with or in any way intermeddle with the defendant's application for the PKNS land or the development thereof but the plaintiff did interfere and consequently, the defendant is discharged from its liability.

[11] In summary, the defence of the defendant is this. That there is no cause of action against the defendant and even if the plaintiff had a cause of action against the defendant it would only accrue when the defendant completes the development on the PKNS land and obtains profits therefrom. According to Diplock L.J, in *Letang v Cooper* [1965] 1 QB 222 at p 242, a cause of action is defined to mean 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.' So, it falls on the plaintiff to prove and must prove, unless admitted, to support his entitlement to the judgment of the court (*Cook v Gill* (1873) LR 8 CP 107; *Read v Brown* (1888) 22 QBD 128 at p 131). It is germane to mention that Lord Diplock's definition in *Letang v Cooper* as set out above was followed, inter alia, in the following cases:

(a) *Lim Kean v Choo Koon* [1970] 1 MLJ 158;

(b) *Nasri v Mesah* [1971] 1 MLJ 32;

(c) *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301;

(d) *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, and

(e) *Credit Corp* [1991] 1 MLJ 409

It is also germane to mention that if there is no cause of action or the cause of action is incomplete or the cause of action is premature then the court is not only entitled but is bound to dismiss it forthwith (*Taib bin Awang v Mohamed bin Abdullah* [1983] 2 MLJ 413; *Sio Koon Lin v SB Mehra* [1981] 1 MLJ 275; and *Lim Kim Swee v Tan Meng Sang* [1960] MLJ 262). And I am urged to dismiss the plaintiff's claim forthwith with costs.

THE MINUTES OF THE FIRST DIRECTORS' MEETING —THE FIRST RESOLUTION

[12] The learned counsel for the plaintiff relied heavily on the minutes of the first directors' meeting to support the plaintiff's claim against the defendant. The learned counsel for the defendant agrees that the minutes of the first defendants' meeting plays a central role in these present proceedings.

[13] Both the minutes of the first and the second directors' meetings may also be referred to as the resolutions of the defendant. It must be recognised that a company has its own separate legal personality. A company is a separate legal entity distinct from its subscribers or incorporators (*Foss v Harbottle* (1842) 2 Hare 461; *Bamford v Bamford* [1969] 1 ALL ER 969; *Biala Pty Ltd v Mallina Holdings* Ltd 11 ACSR 785; *Salomon v Salomon & Co Ltd* (1897) AC 22; *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 AMR 3050; *Macaura v Northern Assurance Co Ltd* [1915] AC 619; *Lee v Lee's Air Farming* [1961] AC 12; *Walker v Wimborne* [1976] 137 CLR 1; and *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1997] 1 AMR 1). The two primary organs of a company would be the members or shareholders in a general meeting and the board of directors. The members or shareholders have a vehicle to express their decisions. It is through resolutions passed in general meetings of the company. On the other hand, the decisions of the directors are expressed by way of resolutions of the board. Then we have to take into account the Memorandum and Articles of Association for in them we will see that the powers

of the company would be divided between the members or shareholders with that of the directors. In law, the acts of the two primary organs of the company would be considered to be the acts of the company itself (*Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374). But the powers of the directors cannot be usurped by the members or shareholders (*John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113; *Scott v Scott* [1943] 1 ALL ER 582; and *NRMA v Parker* [1986] 11 ACLR 1 at p 5). In short, if a power is given exclusively to the directors it cannot be exercised by the members or shareholders.

[14] Now, although the sum of RM10,000.00 is stated in the first resolution as being expenses incurred on behalf of the defendant, this is not the case as is borne out of the plaintiff's own evidence at p 3 of encl 38 at the answer to Question 14 where the plaintiff states:

> (b) RM10,000.00 for money I had spent on clearing the land which Swima Bhd had obtained in Kelana Jaya for a club house and recreation project.

It must be emphasised that the sum of RM10,000.00 was already allegedly expended by the plaintiff even before the defendant took the assignment of the PKNS land from Swima because the first resolution makes mention of this sum as already being expended.

WHAT IS THE EFFECT OF THE FIRST RESOLUTION?

[15] As stated earlier, the first resolution was later read and confirmed by the second resolution. So everything boils down to the first resolution. I must at once say that the first resolution is not relied upon as a document setting out the terms and conditions of the debt nor does it show the existence of the debt. It is relied upon as an admission of the debt. This is borne out by para 3 of the statement of claim which is pleaded in this way (the relevant parts only):

> Hutang-hutang ini telah diakui oleh defendan tersebut dalam mesyuarat pertama pengarah-pengarahnya … dan selepas itu telah disahkan dalam mesyuarat kedua pengarah-pengarahnya …

[16] The plaintiff seems to take the stand that since a debt has been admitted, there is nothing more for the defendant to do but to pay up, and pay up immediately. Unfortunately, this is not the law. There is a material difference between an assertion that a document is evidence of a debt and an assertion that a document is an admission of a debt. What then is an admission? It is defined in s 17 of the Evidence Act 1950 as 'a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact….' So, it can be said that an admission merely suggests or infers a fact. From a reading of s 17 of the Evidence Act 1950, nothing more can be read into the admission other than what can be inferred from the contents thereof. Even if a fact can be inferred from the admission, the admission is not conclusive proof of the fact. Section 31 of the Evidence Act 1950 enacts as follows:

> 31. Admissions not conclusive proof but may estop. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

That being the case, an admission can readily be explained away. That is the law and it is so stated by the Federal Court in *M.A. Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183. In that case, Gill F.J. delivering a unanimous judgment of the Federal Court had this to say as regards an admission contained in a first information report (see p 185 of the report):

> In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under sections 17, 18 and 21 of the Evidence Ordinance, 1950. I find support for this from the decision in Bishen Das v Ram Labhaya A.I.R. 1916 Lahore 133, with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case.

Roberts C.J. had this to say of admissions generally in *Mariam Binte Ahad v Ernesto A. Gacad & Anor* [1986)] 1 MLJ 266 at p 267:

> Also in favour of the plaintiff was an admission made by the first defendant in proceedings which was taken against him in the Magistrate's Court. Initially, he was charged with dangerous driving causing death, but the charge was reduced to careless driving, to which he pleaded guilty.
>
> Under the Evidence Ordinance, s 17, it is open to me to give such weight as I think proper to such an admission. Since it was a plea of guilty, it would also have been admissible at common law under the authority of *Hollington v Hewthorne & Co. Ltd.* [1943] 1 K.B. 587, though, as Mr Clidero rightly pointed out, Denning L.J. observed in *Stupple v Royal Insurance Co. Ltd* [1970] 3 W.L.R. 222, that a plea of guilty is not to be regarded as conclusive, and that it is open to the person who had pleaded to explain, in a subsequent civil trial, why he had done so.

[17] And his Lordship Roberts C.J. eventually disregarded the admission by way of a plea of guilty in the criminal trial on the ground that it did not point to any acknowledgement of any carelessness which was a central issue in a subsequent civil suit for negligence while driving.

[18] A mere admission of a debt is not enough. There must be an admission of a legal liability to pay. V. C. George J (as he then was) had this to say in *Perwira Habib Bank Malaysia Berhad v Haji Abdullah bin Haji Sulaiman & Anor* [1985] 2 CLJ 489 at p 492:

> In my judgment it cannot be said that by that letter the first defendant has unequivocally admitted to liability for the claim made. 'I will pay' does not necessarily imply 'as I am legally obliged to do'.

All these authorities show a singular trend. It is this. That an admission must relate to the subject matter in question and it must also be clear and equivocal. In *Luen Heng & Co v Oakes* [1966] 1 MLJ 14, Abdul Aziz J (as he then was) had refused to enter summary judgment where a club admitted liability in order 'to avoid litigation'. This was what his Lordship Abdul Aziz J, (as he then was) said (see p 14 of the report):

A

> The whole case rests on the interpretation of that part of the letter offering payment by instalments to 'avoid litigation' sent by Mr. Oakes as treasurer of the club. That letter, to my mind, can be interpreted to mean an admission of liability or an independent offer to protect the reputation of the club in respect of misfeasance on the part of the staff of the club. This is a triable issue and is not a matter for the registrar to consider when dealing with an application.

B

WHAT ARE THE ISSUES TO BE DECIDED BY THIS COURT?

[19] From the pleadings and the evidence led in this court, the following issues have to be resolved:

C

(a) whether the first resolution gives rise to an inference that there was a debt owing by the defendant to the plaintiff;

(b) whether that debt is legally enforceable by the plaintiff against the defendant;

D

(c) whether the first resolution, being an internal document of the defendant can amount to an admission of the debt;

(d) whether the defendant was obliged to pay the plaintiff the sum stated in the statement of claim when the defendant developed the PKNS land and obtained a profit thereto; and

E

(e) whether the plaintiff had by his conduct in interfering with the application for the PKNS land discharged the defendant from its obligations with regard to the debt, if any?

I will now consider these issues in quick succession.

F

THE FIRST ISSUE

[20] It is totally misconceived to say that by the first resolution the defendant has admitted the debt to the plaintiff. It is part and parcel of my judgment that the first

G

resolution does not show that the defendant regarded itself as being obligated to pay the debt to the plaintiff. The first resolution, with respect, points to the contrary. The words employed in the first resolution clearly indicate that, if at all, the defendant only intended to bind itself to make payment of the alleged sums to Swima and not to the plaintiff and this can be seen from the following words (see para 1.11

H

of encl 35 as reproduced earlier):

> That the company do take by way of an assignment from SWIMA BHD … (the PKNS land) … and the consideration for the said assignment be as follows:

The consideration referred to is obviously the consideration provided by the

I

defendant to Swima for assigning the PKNS land to the defendant. It may be argued that the plaintiff would be interested in the payment of the money but the plaintiff is a stranger to the promise to pay the debt and he cannot enforce the same legally. As Thomson L.P. said in *Schmidt v Kepong Prospecting Ltd & Ors [* 1964] 30 MLJ 416 at p 420 of the report:

As regards the 1954 agreement, it is only necessary to repeat the often quoted words of Lord Haldane in the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847 at p 853:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.

Counsel for the appellant made a gallant attempt to avoid the consequences of that doctrine but as was said by Viscount Simonds in the case of *Scruttons, Ltd v Midland Silicones Ltd* [1926] A.C. 446 at p 468:

> If the principle of jus quaesitum tertio is to be introduced into our law, it must be done by Parliament.
>
> I should add that at no stage of the case was any attempt made, which in any event would probably have been unsuccessful, to invoke the aid of the case of *Shamia v Joory* [1958] 1 Q.B 448.

This dicta was approved by the Privy Council in*Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 at p 173. A fortiori, it is a common ground here that the sums claimed, namely RM339,333.00 and RM10,000.00, were paid by the plaintiff on account of Swima towards the discharge of the loan owing by Swima to Public Finance. Thus, if at all, there is a debt, it is a debt that is owed by Swima to the plaintiff and not the defendant. At this juncture, it is germane to mention that the plaintiff's oral allegations in his evidence-in-chief as seen at p 9 of the notes of evidence at Part 'A' which reads:

> As the result of this assignment Kelana agreed to pay me. The defendant agreed to pay me the sum of my contribution to pay off Public Finance.

is untrue because it is not borne out nor supported by the objective document in the form of the first resolution and towards this end, I am reminded of the sage words of Chang Min Tat F.J. in the case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234 when his Lordship said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

Furthermore, in this case, Swima was the plaintiff's debtor and Swima could not have assigned the obligations under the debt to the defendant. Under s 4(3) of the Civil Law Act 1956 only a creditor can assign the debt owed to him by his debtor to a third party. That section enacts as follows:

> 4. Administration of insolvent estates, and winding up of companies
>
> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice

A in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, B and the power to give a good discharge for the same, without the concurrence of the assignor.

And none of the conditions of s 4(3) of the Civil Law Act 1956have been complied with, namely:

C (a) that the assignment must be in writing under the hand of the assignor;

(b) that the assignment must be absolute and not by way of a charge only; and

(c) that an express notice in writing must have been given to the person liable to the assignor under the assigned chose in action (see *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365 at p 371, per Chong Siew Fai C.J. (Sabah & D Sarawak).

[21] It is trite law that it is not possible for the debtor to assign a debt owed by him to a third party without the express consent in writing of the creditor. Applying vigorously s 17 of the Evidence Act 1950 to the facts of the present case, I must hold E that the first resolution cannot be used to infer anything favourable to the plaintiff. It does not show, legally speaking, that the defendant owes the plaintiff any money and consequently, the plaintiff's claim should fail.

THE SECOND ISSUE

F **[22]** Even assuming, for a moment, that the first resolution is an admission of the debt, it is, with respect, not an admission of a legal liability to pay the debt. This is because the plaintiff had not furnished any consideration for the defendant to assume Swima's debt to the plaintiff.

G **[23]** In his evidence-in-chief, the plaintiff testifies that (see p 9 of the notes of evidence at Part 'A'):

> The defendant agreed to pay me the sum of my contribution to pay off Public Finance.

and this is certainly an admission that whatever consideration that moved from him H was already provided for at the time of the first resolution. It is ideal to reproduce, at this juncture, the speech of Suffian J, in *J.M. Wotherspoon & Co Ltd v Henry Agency House* [1962] 28 MLJ 86 at p 87, in the context of a consideration evidenced in a letter. There his Lordship said:

I > I am of the view that these are clearly promises of compensation made by the defendant firm to the plaintiff in respect of this consignment and that such promises were made without consideration. An agreement made without consideration becomes a contract if, but only if, in the words of s 26(b) of the Contracts (Malay States) Ordinance No 14 of 1950:
>
> It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor.

It must be borne in mind that the defendant was non-existent at the time of the payments made on behalf of Swima. The defendant has not been incorporated. The plaintiff thus could not and did not do anything for the defendant's promisor. That being the case, the defendant cannot bind itself to a promise to repay the debt. This is the law as exemplified by Lord Wilberforce in *Kepong Prospecting Ltd & Ors v Schmidt* at p 173. There his Lordship speaking for the Privy Council aptly said:

> Their Lordships agree with the Federal Court in holding that this establishes a legally sufficient consideration moving from Schmidt. They accept that the services 'prior to its formation' cannot amount to consideration. No services can be rendered to a non-existent company, nor can a company bind itself to pay for services claimed to have been rendered before its incorporation.

[24] It is argued that the effect of the first resolution particularly in regard to the admission, has been explained away in this manner:

(a) the debt was at all times owed by Swima to the plaintiff;

(b) that when the defendant agreed to assume the debt, it only obligated itself to Swima; and

(c) that there was never ever a legally binding obligation for the defendant to pay the plaintiff the debt at any time.

Thus, the first and the second resolutions cannot support the plaintiff's claim against the defendant. Without the resolutions, there is no evidence of any debt to the plaintiff as claimed in the statement of claim and, consequently, the action herein ought to be dismissed with costs. That would be the submissions of the defendant and I agree with it entirely.

THE THIRD ISSUE

[25] Again, even assuming for one moment that the contents of the resolutions are sufficient to found an obligation on the part of the defendant to pay the monies stated therein to the plaintiff as at the date of the writ, a nagging question still persists. t is this. Whether the resolutions can be led in evidence to prove the admissions? The defendant's case has all along been on this line of reasoning. That a board resolution of a company is an internal document and it is thus private and confidential and it cannot be used against the company to found a liability on the part of the company for what it resolves therein. A resolution is simply what the company resolves to do and whether it actually goes ahead to do so or not is entirely dependent on various other internal factors affecting the company. It is a unilateral declaration of an intention. It is an intention unsupported by any consideration. By way of an orbiter dictum, Edgar Joseph Jr SCJ (as he then was) in *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713, said that there is a fundamental difference between 'intention' and 'motive'. According to his Lordship, 'intention' means seeking to do something and is connected to a purpose or object whereas 'motive' is concerned with the reason for doing something.

[26] There is no general definition of the word 'resolution' in the Companies Act 1965. A resolution is nothing more than a formal decision taken at a meeting by means of a vote. Even though a resolution is a decision of the company, that resolution cannot be regarded as a contract. A good example would be the case of L*am Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors* [1994] 3 MLJ 405. In that case, the company passed a resolution to make interest free advances to shareholders and directors and K C Vohrah J, (as he then was) ruled that this did not amount to a contract between the company and its shareholders and/or its directors.

[27] There are two kinds of resolutions that can be passed. The first one is the directors' resolutions and the second one would be the members' resolutions. Speaking generally, resolutions are usually passed at a meeting, be it a board of directors' meeting or a members' general meeting. It is quite common to come across a situation where the directors' resolutions are passed without any actual meeting of the directors. This would also apply to members' resolutions. But this relaxed situation is only possible where the Articles of the company dispense with the need to hold a meeting before passing a resolution. I know of two cases where the members of a company were held to have informally ratified acts by directors beyond their powers even though no shareholders' meetings had been held. In *Parker & Cooper v Reading* [1926] Ch 975, it was alleged that the director had not been validly appointed but the court held that all the members had informally ratified a debenture granted by the directors even though no meeting had been held. In *Re Duomatic Ltd* [1969] 2 Ch 365, directors' salaries had been paid without the authority of a shareholders' resolution and Buckley J held that the agreement of the two directors who held all the voting shares, even though they had not constituted themselves at a shareholders' meeting amounted to an informal ratification of the payment of unauthorised salaries. Buckley J's decision establishes that all that is required is the unanimous assent of the shareholders with the right to vote. But the Duomatic principle goes to waiver of formalities only and not of substantive rights.

[28] The stand of the defendant is rather simple. It is this. That the mere admission of a debt is not enough and that there must be an admission of a legal liability to pay. But the plaintiff emphasizes on the following words that appear in the first resolution namely, 'will be repaid together with interest at 10% per annum'. The plaintiff further says that the defendant's first resolution clearly names the plaintiff and Gill (DW1) and provides the sums of money due to them before categorically stating 'which sums will be a debt due by the company to the persons named above'.

[29] The fundamental principle of contract law has to be repeated here. It is that the assumption of liability to pay is different from an assumption of a 'legal liability to pay'. In order to determine a legal liability to pay, there must be:

(a) consideration furnished by the plaintiff; and

(b) an intention to create legal relations between the plaintiff and the defendant.

Two authorities immediately come to mind. The first is *Choo Tiong Hin & Ors v Choo Hock Swee* [1959] 25 MLJ 67, where the headnote at p 68 reads as follows:

Held, affirming the decision of Tan Ah Tah J:

(1) the agreements alleged by the appellants, even if proved, were not intended to create legal relations, and were therefore not binding in law as contracts

The second would be *M.N Guha Majumder v R.E. Donough* [1974] 2 MLJ 114 and the headnote at p 144 states as follows:

(2) the evidence indicated that the parties did not intend to be immediately bound. They had not the necessary animus contrahendi. What passed was only a negotiation from beginning to end.

[30] The plaintiff here has not furnished any consideration. There must be consideration provided by each of the parties. This means that there must be some kind of exchange between the parties. A gratuitous promise cannot be enforced in a court of law. Thus, if 'X' gives his car to 'Z' and 'Z' agrees to have it, 'X' has voluntarily made a promise to 'Z' and it is called a gratuitous promise which 'Z' cannot enforce in law if 'X' changes his mind. If, however, 'X' promises to hand over his car and 'Z' promises to pay 'X' a sum of money in return, each of the parties have provided consideration and it is enforceable in a court of law. In short, each party must give something in return from what is gained from the other party. Consideration may be divided into two categories; executory and executed. Executory consideration arises where something is to be done in the future after the contract has been formed. Whereas executed consideration would be where at the time of the formation of the contract the consideration has already been performed. The bottom line is this. That consideration must be given in return for the promise or act of the other party. Unfortunately, in this case, the plaintiff did not furnish any consideration.

[31] To confound the matter further, there is no intention to create legal relations between the plaintiff and the defendant. But there is an intention to create legal relations between Swima and the defendant. And this is manifested in the first resolution. And it is also the only manifestation in the first resolution.

THE FOURTH ISSUE

[32] It is the defendant's case that the first resolution was executed on terms as to time for repayment and that would be after the PKNS land has been developed and profit obtained thereto. The evidence of Gill (DW1) states the same thing. Even the statement of defence pleads that the resolutions were executed on the condition that the debt will be paid upon development of the PKNS land and upon obtaining a profit therefrom.

[33] The plaintiff submits that nowhere in para 1.11 (b) of the first resolution or in any other part of the first resolution is it stated that the debt will only be repaid after the PKNS land is developed and profit realised from the development. The plaintiff further submits that in para 1.12 of the first resolution, the defendant acknowledges a further debt of RM10,000.00 to the plaintiff at 10% per annum interest and states that the debt will be repaid. The plaintiff emphasizes that nothing is stated in the first resolution about repayment after the PKNS land has been developed or upon realisation of the profit. Whilst the defendant agrees to all these

submissions, the defendant submits that what is also absent from the first resolution is in regard to any provision relating to the time for repayment which is a matter that is left to the defendant to resolve in the future. Now, the issue of critical importance is this; whether the defendant's explanation as to the time of such repayment can be accepted? The learned counsel for the plaintiff submits that sections 91 & 92 of the Evidence Act 1950 prohibit the introduction of parol evidence to contradict, vary or add to the terms of a contract reduced into writing. The learned counsel for the defendant submits that this is a misconception of the plaintiff's own case and an inability to distinguish between an internal document of a private limited company and a contract entered between two parties. It must be borne in mind that the first resolution is not a contract. It is an admission and was pleaded and at all times treated as such by the plaintiff. This admission must be viewed separately from the contract under which the debt was incurred. Thus, in my view, to treat the first resolution as a contract for a debt and an admission of a debt interchangeably is wrong. In the present case, the contract for which the debt was incurred does not exist, let alone one which has been reduced into writing and sections 91 & 92 of the Evidence Act 1950 do not apply. In *Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors*, K C Vohrah J (as he then was) when dealing with a resolution almost similar to the present case aptly said at p 409 of the report:

> I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders. That the document shows that it is a resolution signed by three directors stating that the company 'do hereby make an advance' to the directors and shareholders does not indicate that it is a contract. Nowhere in P1 is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants. More specifically, there is nothing in the resolution which shows that 'at the request of the defendants the plaintiff advanced and the defendants borrowed …' certain sums of money as averred in para 5 of the statement of claim. I fail to see how either s 91 or s 92 of the Evidence Act 1950can be invoked.

[34] It is also ideal to refer to the speech of Augustine Paul J.C., (as he then was) in *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329. There his Lordship said at p 341 of the report as follows:

> The best evidence about the contents of a document is the document itself and it is the production of the document that is required by s 91 in proof of its contents. In a sense, the rule enunciated by s 91 can be said to be an exclusive rule in as much as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act 1950. Section 92 applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s 91. In other words, it is after the document has been produced to prove its terms under s 91 that the provisions of s 92 come into operation to exclude evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92, in effect, supplement each other. Section 91 would be frustrated without the aid of s 92 and s 92 would be inoperative without the aid of s 91. Since s 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under s 91, it may be said that it makes the proof of the document conclusive of its contents. Like s 91, s 92 can also be said to be based on the best evidence rule (see Bai Hira Devi v Official Assignee AIR 1958 SC 448). Having dealt with the fundamental features of the two sections, I shall

first consider the extent to which the contents of documents falling within the category of documents to which s 92 applies can be contradicted.

In other words, the purported contract must have been proved first under s 91 of the Evidence Act 1950 in order to render it applicable under s 92 of the same Act. And since no contract for the debt which had been reduced into writing has been tendered in this case, there is therefore no basis at all for invoking sections 91 and 92 of the Evidence Act 1950. In *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors*, Augustine Paul J.C. (as he then was) when speaking on the issue of whether a return of allotment of shares can be contradicted contrary to s 92 of the Evidence Act 1950 said at p 347 of the report:

The corollary is that the prohibition contained in s 92 of the Evidence Act 1950 applies only to bilateral and dispositive documents. The section has no application to unilateral and non-dispositive documents such as police reports and in consequence thereof, oral evidence is admissible to contradict them.

[35] Likewise here, the resolutions are indeed unilateral and non-dispositive documents and thus oral evidence may be adduced to explain the time when the defendant intended to pay the Swima debts. I wish to highlight that proviso (b) to s 92 of the Evidence Act 1950 allows oral evidence to be led to prove an oral agreement as to the time when payment under the debt would become due. Section 92 of the Evidence Act 1950 enacts as follows:

92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.

And illustration (f) allows evidence as to time for performance to be adduced orally as follows:

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

Now, in the present case, the first resolution is silent as to the time of payment. The oral evidence adduced by the defendant as to the time in which payment is to be made, that is after development of the PKNS land, is not inconsistent with the terms of the first resolution and therefore may be proved in evidence. It must be emphasised that the defendant had indeed given evidence that it was at all times

agreed that the plaintiff will only be repaid the sums stated in the resolution after the development of the PKNS land and after obtaining profit therefrom. The defendant has explained why this was so and that explanation may be itemised as follows:

(a) that the defendant had no means of paying the plaintiff the sum stated in the first resolution;

(b) that the PKNS land was the only asset of the defendant;

(c) that the defendant would only have the funds upon completion of the development of the PKNS land;

(d) that the plaintiff knew of this and Gill (DW1)was also in the same position because Swima owed him the sum of RM678,666.00 which sum would only be paid upon development of the PKNS land; and

(e) that upon completion of the development of the PKNS land, the profit would be distributed to its shareholders and Swima being a shareholder would receive dividends which could then be applied towards payment of its creditors and the creditors would include the plaintiff and Gill (DW1).

In my judgment, all these are the objective factual background behind the first resolution and they are admissible. I find solace in the speech of Mohamed Azmi F.J, (as he then was) in the case of *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243. There his Lordship, writing for the Federal Court, had this to say at p 247 of the report:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

It is germane to mention that these matters were put to the plaintiff in cross-examination but the plaintiff merely denied them. The plaintiff did not advance nor prefer any contrary explanation as to why, despite all these matters, the defendant was obliged to immediately pay the plaintiff the sums stated in the first resolution. For these reasons, and on the balance of probabilities, the evidence on behalf of the defendant ought to be preferred and accepted. I venture to say that the first resolution is a unilateral document of the defendant. The explanation of the directors as to the time in which the debt is to be repaid is the best evidence and, in fact, it should be the only evidence.

THE FIFTH ISSUE

[36] Gill (DW1) had given evidence that the first resolution was executed on terms that the plaintiff will not interfere with the defendant's rights to the PKNS land and its development as a condition precedent towards the defendant honouring its promise to pay the plaintiff. Proviso (c) to s 92 of the Evidence Act 1950allows evidence of this nature to be led. That proviso states as follows:

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

[37] And on the evidence, the defendant had proved on the balance of probabilities that the plaintiff had interfered with the defendant's rights to the PKNS land and the development thereof.

THE ARGUMENTS ADVANCED BY THE PLAINTIFF AND THE REBUTTALS THERETO

[38] It was submitted that there was no direct question asked of the plaintiff relating to the plaintiff's claim for RM349,333.00 at 10% interest per annum. Obviously, this submission is erroneous because in the examination-in-chief as well as in the witness statement, the plaintiff had admitted that the amount of RM1,018,000.00 was the sum paid to Public Finance in respect of the original loan of RM650,000.00 plus interest accumulated over the years which had been granted to Swima against the charge over the McWilliams property and of which the plaintiff held a Power of Attorney. This payment was to redeem the McWilliams property which was under foreclosure. The plaintiff also admitted that 1/3 of this payment was his share of the payment for the redemption on behalf of Swima. The plaintiff also stated in his examination-in-chief that, 'when Mr Gill and I paid off the debt to Public Finance, it was on the understanding that what we paid would become the value of our shareholding in Swima Bhd'. Thus, with these answers given by the plaintiff there was no necessity to ask him any further questions regarding this sum as the plaintiff had admitted that it was not incurred nor paid on behalf of the defendant.

[39] It was alleged by the plaintiff that the cross-examination was a mere fishing expedition on the part of the defendant. The defendant denied the allegation. On perusal of the notes of evidence it is clear that the cross-examination confirms that the plaintiff as the deputy general manager of PKNS had a vested interest in securing the PKNS land for Swima as Mohd Yussof Zainal held 50% of his shares in trust for the plaintiff. Further when the plaintiff could not come up with funds to subscribe for the allotment of shares the plaintiff acted out of spite to the detriment of the defendant by causing PKNS to cancel the offer after the plaintiff had threatened to do so as evidenced by his letter sent through his lawyers as seen at pp 48 and 49 of encl 35 of the Bundle of Documents. The plaintiff's denial of persuading PKNS to cancel the offer does not bear out with the contemporaneous documents and the fact that PKNS had indeed cancelled the offer.

[40] The defendant puts to the plaintiff the defendant's case that there was no debt owed by Swima to the plaintiff in the first place. A large portion of the so-called advances made by the plaintiff were used without board approval for the plaintiff's and for Mohd Yussof Zainal's personal purposes. This is certainly in line with the defendant's submissions that the admission being capable of being explained away, the plaintiff was obliged to prove the existence of the debt owing by Swima which the defendant assumed and which the plaintiff failed to do so. It must be emphasised and

it is the defendant's submissions that the plaintiff had a grievance against the defendant since the plaintiff was unable to subscribe for shares in the defendant and because of this the plaintiff tried to ensure that the defendant did not obtain the PKNS land.

[41] The plaintiff's counsel submitted that the plaintiff's case was not shaken under cross-examination. It was also submitted that the defendant's attempts to show that the plaintiff unlawfully spent Swima's money, which was irrelevant to the claim, sank lamely into oblivion. The plaintiff also contended that he did not sign Swima's cheques and that the expenditure had the board's approval. But unfortunately, no foundation was laid by the plaintiff before the plaintiff's counsel made such a sweeping statement. The fact of the matter is this. That the plaintiff's submission is contrary to the evidence and that the plaintiff admitted signing the note to Gill (DW1) confirming that he had taken the money without approval. It was certainly the plaintiff's obligation to produce the necessary evidence to show that it was not he and Mohd Yussof Zainal who signed the cheques and to show, at the same time, that he did not take the money.

[42] The defendant produced the best evidence it had in the form of three directors who are advocates and solicitors whose evidence was never shaken unlike the plaintiff who suffered from selective amnesia while under cross-examination. It was not for the defendant to bolster the plaintiff's case but to lay before the court evidence and the contemporaneous documents relating to the transaction. There is no basis at all to invoke any presumption under s 114 (g) of the Evidence Act 1950. The fact that Gill (DW1) produced a photocopy of a page from the ledger and informed the court that the accounts clerk of Swima had given him that page cannot be implied to show that Gill (DW1) had control and maintained the accounts of Swima. It must be borne in mind that Gill (DW1) was a full time practising lawyer in Kuala Lumpur while the plaintiff and Mohd Yussof Zainal attended office at Swima which was located in Kelana Jaya.

[43] It was pointed out that the learned counsel for the defendant did not question the plaintiff about the plaintiff's claim for RM349,333.00. And flowing from this, it was submitted by the plaintiff that the plaintiff's evidence about his claim remains uncontradicted and unshaken in its entirety. But it must be borne in mind that the plaintiff had already in examination-in-chief admitted that the money was owed by Swima to him and he also denied that there was any condition attached to the repayment of the debt or as to the time for repayment. Therefore, there was no need to waste time and cross-examine the plaintiff on this issue.

[44] Again, no foundation was laid by the plaintiff to support the plaintiff's allegation that Gill (DW1) was lying. It was not even put to Gill (DW1) that he was lying when he was being cross-examined. Just because Gill's evidence as to the time for repayment is silent in the first resolution, that does not mean that Gill (DW1) is lying, for otherwise there can never be any exception to sections 91 and 92 of the Evidence Act 1950. The plaintiff was fully aware of Swima's liabilities to its contractors. The plaintiff knew that the only way to save his investment in Swima was by transferring the PKNS land to the defendant in return for the shares and that he

would also be allowed to subscribe for the shares in the defendant as set out in the first resolution but, alas, the plaintiff was unable to subscribe to the shares and as a result thereof the plaintiff created problems with PKNS and filed the present suit.

[45] It was submitted that in the face of the first resolution, Gill (DW1) had lied in this court. It was also submitted that Gill (DW1), as an advocate and solicitor should know his duty and be honest and candour to this court. The learned counsel for the defendant took exceptions to these submissions. It was pointed out that the criticism was a convoluted attempt to insult and disparage Gill (DW1), an advocate and solicitor of more than 34 years standing. I have nothing to say about the conduct of Gill (DW1). I keep an open mind. I merely look at the evidence. The circumstances surrounding the transaction will demonstrate that Swima was a broken sinking ship, so to speak, and Swima was owing its creditors in excess of RM2.5 million excluding the RM1,018,000.00 owed to its contributories. The only way of saving the sinking ship and to keep it afloat, so to speak, was to remove Swima's only asset to a new company and then to develop it for a profit. Before any development could take place payment of the purchase price would have to be made to PKNS. This would have to be raised from the same shareholders of Swima which included the plaintiff, and it would defy logic to say that irrespective of anything the plaintiff who was a party to this scheme is entitled to be paid by the defendant forthwith. Any payment to the plaintiff would amount to a preferential payment as he was a creditor of Swima. The defendant's liability and agreement to pay was with Swima and hence payment can only be made to Swima. The courts will certainly not lend their hands to furthering an unlawful act. However, if the profit from the development is paid to Swima and all the other creditors are also paid then payment to the plaintiff and Gill (DW1) would not be a preferential payment at that point of time.

[46] Incidentally, there is no evidence on the part of the plaintiff that the defendant acknowledged the debt to the plaintiff 'in consideration of the plaintiff's agreeing to Swima's assignment of the land to the defendant'. Therefore, there is no issue of the application of the doctrine of estoppel. It must be emphasised that estoppel was not pleaded (*Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors*).

[47] According to the plaintiff, all the elements of a legal and contractual obligations are satisfied in that the plaintiff agreed to allow the defendant to take the PKNS land by way of an assignment so that the defendant would assume the debt due to the plaintiff from Swima. This was hotly disputed by the defendant. According to the defendant, the legal and contractual obligations are not satisfied vis-a-vis the plaintiff and the defendant. What was satisfied was between Swima and the defendant. But that is not an issue here.

[48] On the available evidence, only Swima agreed to allow the defendant to take the PKNS land by way of an assignment. The plaintiff did not. Even if the defendant agreed to pay the plaintiff in consideration of Swima assigning the PKNS land to the defendant, the plaintiff remains a stranger to this obligation. The plaintiff is not privy to it. The plaintiff is merely a person who stands to benefit from the contract.

The obligation to pay the plaintiff is owed by Swima. Only Swima may sue as it was Swima:

(a) who provided the consideration for the defendant to incur such an obligation by assigning the PKNS land (see the first resolution); and

(b) with whom the defendant contracted

[49] Thus, there was no contract between the plaintiff and the defendant. The fact that the plaintiff would ultimately benefit from the contract is irrelevant. The plaintiff is a stranger to the contract. The plaintiff also provided no consideration to the agreement by the defendant to pay the plaintiff the sums claimed therein. Contrary to what the learned counsel for the plaintiff has submitted, there is no evidence that the plaintiff agreed 'to allow the defendant to take the land by way of an assignment'. It is a mere bare statement from the bar. Having perused through the notes of evidence as well as the plaintiff's witness statement, the only evidence worth referring to that was given by the plaintiff would be as follows (see p 9 of the notes of evidence at Part 'A'):

> Swima land was transferred from Swima Sdn Bhd to Kelana Resort Sdn Bhd by assignment on or about 18 March 1991. This deed is found in 21 (35). As the result of this assignment Kelana agreed to pay me. The defendant agreed to pay me the sum of my contribution to pay off Public Finance.

[50] This piece of evidence is quite equivocal, to say the least, in that nothing is shown to give rise to any fact that the plaintiff had provided any consideration for the defendant's obligation to pay him. This evidence shows that the defendant agreed to pay the plaintiff as a result of the assignment by Swima which is correct but it does not help the plaintiff as it is a mere statement of the objective facts. I hasten to add and regretfully repeat that the defendant agreed with Swima and not the plaintiff and it was Swima who provided the consideration. To confound the matter further, nothing is said about the defendant 'agreeing' to pay the plaintiff as a result of the plaintiff agreeing to the assignment. I must reiterate that the PKNS land belonged to Swima and not the plaintiff and it is trite law that the shareholder or director of a company has no interest in the assets belonging to the company. Consequently, the argument that the plaintiff provided consideration by 'agreeing to the assignment' is a complete balderdash. It must be borne in mind that the plaintiff by signing the deed of assignment did so in his capacity as a director of Swima and not in his personal capacity as the owner of the assets. In fact, the evidence of the plaintiff is that his agreement was given for a different purpose so that the Swima shareholders, including himself, could subscribe into a company holding the PKNS land and which company was free of debt whilst Swima was laden with liability in excess of RM2.5m to the contractors and consultants as can be seen from the answer to a question put to him under cross examination (see p 30 of the notes of evidence at Part 'A'):

> Q: I put it to you the purpose of the new company to take over land was because in view of Swima's liability of RM2.5m it was agreed by the shareholders including yourself that a fresh lease be given to a new company and existing shareholders of Swima can subscribe for shares in the new company in the proportion of their shares in Swima, the idea was because the new company will be clean.

A: Whatever they decided I agree though I have different views. I only looked after the technical side.

Thus, it can be surmised that the plaintiff's motives were strictly selfish and merely confined to the interests of Swima which is a private matter between the plaintiff and Swima. The plaintiff also neither pleaded nor gave evidence that this act was a consideration furnished by him for repayment of the debt due from the defendant. It was Swima who allowed the PKNS land to be transferred to the defendant. It was not the plaintiff who allowed this to happen. For starters, it was not the plaintiff's land and it was not for him to agree to the assignment to the defendant. It must be borne in mind that the plaintiff only had about 21.3% of the shareholding in Swima, while Gill (DW1) and Dato' Malik Salleh controlled the rest. Both these two personalities could have carried any vote of Swima's board or shareholders to assign the PKNS land to the defendant without reference to the plaintiff. Whether the plaintiff agreeing or not to the assignment, if at all that was the case, is of no consequence because the plaintiff had no basis to stop or prevent it from happening. The plaintiff's intention in belatedly submitting that he had agreed to the assignment from Swima to the defendant is solely to create a hitherto non-existent consideration to uphold the claim herein and to lay an unsupported foundation to a submission based on estoppel which was neither pleaded nor was evidence given on it.

[51] The plaintiff argued vehemently that the resolutions of the defendant are legal public documents required by law to sanction the transaction entered into by the defendant. According to the plaintiff, the resolutions themselves do not state that they are private, confidential or internal documents. The defendant held opposite views. The defendant submitted that the resolutions are not public documents and that they are not required to be filed with the Companies Commission or with any other public body. I entirely agree with the defendant's submissions. By their very nature, the resolutions are internal documents. Not a shred of evidence is required for the defendant to say that that is so. It is true that the resolutions are required by law to sanction the transaction. But this does not mean that they would become public documents. The transaction was between the defendant and Swima. It was not between the defendant and the plaintiff. It is rather unfortunate that Swima was not made a party to this suit.

ANALYSIS

[52] The following observations must be made:

(a) the claim herein can only be decided on the pleadings and the evidence before the court;

(b) this is not a court of morals where the court is obliged to decide whether the defendant ought to have paid the plaintiff or not the claimed sums;

(c) the essential and pertinent question to pose is whether the defendant is legally obliged to pay the plaintiff or Swima;

(d) it is not the duty of this court to correct a bargain made between the parties and lend legitimacy to the bargain based on what it thinks ought to have happened; and

(e) this court may only grant the orders prayed for if satisfied that the plaintiff has a direct legal claim against the defendant.

[53] Flowing from all these observations, it is part and parcel of my judgment that there is no direct legal claim by the plaintiff against the defendant and the basis for saying so will now be considered herein.

THE EXISTENCE OF A DEBT OWED BY THE DEFENDANT

[54] The plaintiff merely makes the following averments:

> … tuntutan plaintif adalah untuk … RM339,333.00 … dan jumlah selanjutnya sebanyak RM10,000.00 … hutang ini telah diakui oleh defendan …

[55] It is one thing to plead what the plaintiff's claim is. And it is another thing to plead the basis for the claim. Here, there is no basis pleaded for the claim save that the defendant admitted the debt. In the early part of this judgment, I have explained that there is a material difference between the existence of the debt and its admission thereof. Relying on sections 17 and 31 of the Evidence Act 1950, said that an admission is not conclusive proof of the debt. It is only suggestive of the debt. An admission must be supported in some material manner so as to prove the existence of the debt in the first place. I draw an analogy with a criminal case where it is always unsafe to convict based on a confession alone. Here, what is certain is this. There was never any debt owed by the defendant to the plaintiff and, consequently, the purported admission is of no value at all. The facts show that one Pemba Sdn Bhd sold its property and the proceeds of which was used to settle a debt owed by Swima to Public Finance. By the first resolution, these monies were later regarded as having been paid by the plaintiff and Gill (DW1) on behalf of the defendant pursuant to the first resolution.

[56] But when these monies were paid, the defendant was not even incorporated. Consequently:

(a) the defendant did not incur the debt to the plaintiff; and

(b) the defendant would not have entered into a contract for the debt with the plaintiff.

[57] In any event, the plaintiff never paid any money to discharge Swima's debt for the sum of RM339,333.00. It was Pemba Sdn Bhd who did that. It must be emphasised, however, that the plaintiff did pay the sum of RM10,000.00 personally.

[58] If at all that the first resolution suggests that there is a debt, it is a debt (an obligation would be a better word) owed to Swima to pay to the plaintiff. It is untenable to say that the first resolution is a contract. I say this for the following reasons:

(a) that the plaintiff is not a party to the first resolution, he is a stranger;

(b) that there was no intention to create legal relations between the plaintiff and the defendant; and

(c) the plaintiff furnished no consideration to the contract.

THE ADMISSION IS OF NO PROBATIVE VALUE

[59] Since there is no contract for a debt directly to the plaintiff in the first place, the so called admission is of no probative value. The admission does not admit to a legal obligation to the plaintiff to pay. 'I will pay' does not mean that 'I am legally obliged to pay'. This is consistent with s 2(h) of the Contracts Act 1950 which states that 'an agreement enforceable by law is a contract'. At any rate, the admission has been explained away in this manner:

(a) that there is no debt to admit to;

(b) that there is no admission as to a legal liability to pay; and

(c) in fact, there is no legal obligation to pay the plaintiff.

NO LEGAL OBLIGATION TO PAY

[60] In my judgment, there is no legal obligation on the part of the defendant to pay and it is for the following reasons:

(i) on a simple reading of the first resolution, the obligation to pay the debt was owed to Swima;

(ii) the plaintiff did not furnish any consideration to the defendant so as to enable the defendant to assume the debt directly actionable by the plaintiff against the defendant; and

(iii) that there was no proper assignment of the debt owed by Swima to the plaintiff so as to now make the defendant to step into Swima's shoes.

NO CONSIDERATION PROVIDED BY THE PLAINTIFF

[61] It is to limit the enforceability of an agreement that the doctrine of consideration comes into the fold. The view that agreements were binding without consideration so long as they were in writing was rejected many years ago; to be precise over 200 years ago (*Rann v Hughes* (1778) 7 T.R. 350 n, 4 Bro. P.C. 27). According to the case of *Thomas v Thomas* (1842) 2 QB 851 at p 859, in order to make a promise enforceable as a contract there must be 'something which is of some value in the eye of the law'. And this is the basic feature of the doctrine of consideration. Thus, an informal gratuitous promise does not amount to a contract (*Re Hudson* (1885) 54 L.J.Ch 811; *Re Cory* (1912) 29 TLR 18; *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at p 19). Lush J, defined consideration in *Currie v Misa* (1875) L.R. 10 Ex 153 at p 162, in this way:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other …

Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* [1915] AC 847 at 855 defined consideration in this manner:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

There is no necessity that the consideration must be sufficient. Suffice that it is adequate. The court will not question whether the value is adequate and the court too will not interfere with the fairness of the bargain made by the parties (*Chappell & Co. Ltd v. Nestle Co. Ltd* [1960] A C 87). Consideration must move from the promisee (*Tweddle v Atkinson* (1861) B & S 393 at p 169; *Barber v Fox* (1670) 2 Wms. Saund. 134, n. (e); *Thomas v Thomas*; and *Pollway v Abdullah* [1974] 1 WLR 493 at p 497) and this means that a person can only enforce a promise if he himself has provided consideration for it. And the consideration has 'some value in the eye of the law'.

[62] I must reiterate that the plaintiff did not provide any lawful consideration to the defendant for assuming the debt from Swima. The only consideration in evidence provided by the plaintiff was that Pemba Sdn Bhd, which the plaintiff confuses with himself personally, had made payments towards the discharge of the McWilliams property that was charged for the benefit of Swima to Public Finance and towards clearing the pond, bushes and the like. But this was not consideration to the defendant which was not even in existence at that time. And by virtue of s 2(d) of the Contracts Act 1950 nothing that the plaintiff did could not have been done at the desire of the defendant and, therefore, there is no consideration provided by the plaintiff.

[63] Going on an uphill task, the plaintiff now adds a further element, in his submission, in an attempt to show that there is consideration. He submitted through his learned counsel that he allowed the defendant to take the assignment of the PKNS land. With respect, this ought not to be accepted because:

(a) it is not pleaded; and

(b) there is no evidence that this act was the agreed consideration for the agreement to pay the plaintiff.

I venture to say that it was not the plaintiff's land to 'agree' to the assignment or not. It was Swima as the owner of the PKNS land which agreed to the assignment. The plaintiff was only a minority shareholder of Swima and on its board and his agreement was of no consequence at all. At any rate, the plaintiff himself has stated on oath that he agreed to the assignment for a different purpose. It was to save the PKNS land from the hands of the creditors.

NO VALID ASSIGNMENT OF THE DEBT

[64] There is no valid assignment of the debt from Swima to the plaintiff and in any event Swima as a debtor to the plaintiff cannot assign that debt back to the plaintiff. All Swima could have done was to assign absolutely the benefit accruing to it from the defendant to the plaintiff which has not been proven or done.

Consequently, if at all, the defendant unwittingly or not merely assumed a moral obligation to pay the plaintiff.

CONCLUSION

[65] For the reasons as adumbrated above, I must dismiss the plaintiff's claim with costs. There is no debt owed by the defendant to the plaintiff. The first resolution does not evidence a debt owed by the defendant to the plaintiff but, if at all, to Swima. Even if it was an admission of a debt to the plaintiff, it is not legally enforceable. The first resolution remains an internal manifestation of intention and it cannot form any obligation on the part of the defendant to pay the plaintiff. At any rate, the admission in the first resolution has been explained away by the defendant. The plaintiff has failed to prove that a debt is owed by the defendant. The plaintiff too has failed to prove that the first resolution is an acknowledgement of that debt.

Plaintiff's claim dismissed with costs.

Reported by Navit Kaur Randhawa